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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE W. ..KER, WILLIE J. WILLIS,

*Petitioners,*

—v.—

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

## BRIEF FOR PETITIONERS

CONSTANCE BAKER MOTLEY
JACK GREENBERG
10 Columbus Circle
New York 19, N. Y.

ARTHUR D. SHORES
PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Birmingham, Alabama

*Attorneys for Petitioners*

LEROY CLARK
WILLIAM T. COLEMAN, JR.
MICHAEL MELTSNER
WILLIAM R. MING, JR.
JAMES M. NABRIT, III
LOUIS H. POLLAK
*Of Counsel*

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*Petitioners,*

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CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

## BRIEF FOR PETITIONERS

### Opinions Below

The opinions of the Court of Appeals of Alabama are reported at 133 So. 2d 697 (Gober, R. 58); 133 So. 2d 703 (Davis, R. 88); 133 So. 2d 703 (Hutchinson, R. 124); 133 So. 2d 704 (King, R. 144); 133 So. 2d 705 (Parker, R. 118); 133 So. 2d 705 (Sanders, R. 220); 133 So. 2d 706 (Walker, R. 262); 133 So. 2d 707 (West, R. 194); 133 So. 2d 707 (Westmoreland, R. 236); 133 So. 2d 708 (Willis, R. 278).

### Jurisdiction

The judgments of the Alabama Court of Appeals were entered on May 30, 1961 (Gober 64, Davis 88, Hutchinson 124, King 144, Parker 178, West 194, Sanders 220, West-

moreland 236, Walker 262, Willis 278). Petitions to the Supreme Court of Alabama for Writs of Certiorari were denied on September 14, 1961 (Gober 69, Davis 92, Hutchinson 128, King 144, Parker 182, West 194, Sanders 224, Westmoreland 236, Walker 266, Willis 278).

Applications to the Supreme Court of Alabama for rehearing were overruled on November 2, 1961 (Gober 71, Davis 92, Hutchinson 128, King 144, Parker 182, West 194, Sanders 224, Westmoreland 236, Walker 266, Willis 278).

The jurisdiction of this Court is invoked pursuant to United States Code Title 28, Section 1257 (3), petitioners having asserted below, and asserting here, the deprivation of their rights, privileges, and immunities secured by the Constitution of the United States.

## Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following sections of the City Code of Birmingham, Alabama:

> "Section 1436 (1944), *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.
>
> Section 369 (1944), *Separation of races.* It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance

of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, Section 5288).

## Questions Presented

Petitioners have been arrested, convicted, and sentenced to prison for refusal to obey the request to leave a lunch counter in a department store open to the public, including Negroes. This request was predicated on a city ordinance requiring racial segregation in eating facilities buttressed by a massive state policy of segregation. The premises are extensively licensed and regulated by the City and State. And, Alabama has failed to accord Negroes the right of equal access to public accommodations.

### I.

A. May these state court convictions stand consistently with the Fourteenth Amendment in view of the fact that the segregation which gave rise to them was based upon a city ordinance requiring racial segregation in eating facilities buttressed by a massive state policy of racial segregation?

B. May these convictions stand consistent with the equal protection clause of the Fourteenth Amendment as enforcement of the private determination of department stores to exclude Negroes from certain eating facilities?

C. In addition to the foregoing considerations, is not the property right which Alabama sought to protect here—the right to discriminate racially in a single portion of a store open to the general public—so inconsequential to the main core of the store's proprietary interests that the state may not, compatibly with the Fourteenth Amendment, enforce that right by its criminal laws?

D. Is not the degree of supervision and control which the City and the State exercise over the department store lunch counters here, given the circumstances set forth above, so extensive a form of state involvement that the State has an obligation to afford equal protection?

E. In view of the fact that Alabama denies protection to Negroes against racial discrimination in public accommodations, do not the circumstances set forth above establish a denial of equal protection of the laws?

## II.

A. Has Alabama denied petitioners freedom of speech secured by the Fourteenth Amendment by using its criminal trespass laws as a device to stop petitioners from persuading the department stores in Birmingham to abandon their policies of discrimination at the lunch counters?

B. Is not freedom of speech impaired by failure to construe the statute under which conviction was obtained to require notice that the request to leave the premises was given by one who had established authority to issue such request at the time given?

## Statement of the Case

Petitioners, ten Negro students, were all tried seriatim in groups of two and simultaneously convicted on October 10, 1960 following sit-in demonstrations at department store lunch counters serving white customers only, in Birmingham, Alabama (R. 9, 81, 100, 136, 15[illegible], 1[illegible]7, 202, 229, 244, 271). Each petitioner was charged with having violated §1436, General City Code of Birmingham, 1944, which provides as follows:

> "Any person who enters into the dwelling house, or goes or remains on the premises of another, after being

warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties." (R. 2, 73, 93, 129, 145, 183, 195, 225, 237, 267).

Originally tried and convicted in Birmingham's Recorder's Court, petitioners' appeals and trials *de novo* in the Circuit Court, Tenth Judicial Circuit of Alabama, ended in new convictions and fines of $100 each and 30 days in jail. Simultaneous appeals were taken to the Court of Appeals of Alabama where the convictions were affirmed (R. 57, 88, 124, 144, 178, 194, 220, 236, 262, 278) followed by denials of petitions for writs of certiorari in the Supreme Court of Alabama (R. 65, 92, 128, 144, 182, 194, 224, 236, 266, 278). A single petition for writ of certiorari was filed in this Court and granted on June 25, 1962 (R. 279). (Stipulations as to printing of record R. 279.)

Petitioners claimed that their convictions deprived them of due process and equal protection guaranteed by the Fourteenth Amendment to the Federal Constitution. These constitutional claims were first raised by motions to strike the complaint (R. 3, 74, 94, 130, 146, 184, 196, 226, 238, 268); demurrers (R. 4, 75, 95, 131, 147, 185, 197, 227, 239, 269); motions to exclude the testimony (R. 6, 77, 97, 133, 148, 187, 199, 229, 241, 271); motions for new trial (R. 12, 83, 103, 139, 154; 189, 205, 231, 247, 273); assignment of errors (R. 56, 87, 123, 142, 177, 192, 219, 234, 276) and in the petitions for writs of certiorari in the Supreme Court of Alabama (R. 66, 89, 125, 144, 179, 194, 221, 236, 263, 278).

On appeal to the Court of Appeals a decision was rendered in the first case, *Gober*, on the basis of which all other convictions were affirmed (R. 58-64, 88, 124, 144, 178, 194, 220, 236, 262, 278). That court upheld the overruling of Gober's motion to strike the complaint on the ground that it

was not a proper method of testing the sufficiency of the complaint (R. 59-60) and the overruling of grounds 1, 2, 3 and 4 of the demurrer on the ground that these were too general in nature and did not point out any specific defect in the complaint (R. 60).

All of the constitutional grounds urged in the demurrer were rejected on the ground that "no constitutional application of the ordinance . . . appears from any of the pleadings. Such unconstitutional application would be a matter of evidence. These grounds, setting up a speaking demurrer, necessitated an overruling of the demurrer in this aspect" (R. 61). The trial court's denials of the motion to exclude the evidence and for a new trial were also affirmed (R. 61). Gober's free speech and equal protection claims were held "entirely inapplicable" (R. 61).

Although petitioners' counsel on the trial brought out the existence of an ordinance requiring segregation in restaurants in Birmingham (R. 24-26), the court ruled that there was no question raised in the record, by the pleadings, of any ordinances requiring segregation in restaurants (R. 63). However, ordinances of the City of Birmingham are judicially noticeable in Alabama (7 Code of Alabama, §429 (1)). The court then concluded that since the department store involved was a private enterprise, petitioner entered as a licensee whose license was destroyed when petitioner was requested to leave the restaurant by an official and refused, making him a trespasser (R. 63-64). The court also ruled that since the store owned the premises which petitioner refused to leave, the store had "a full right to limit the use of its own premises as it saw fit" (R. 63), a right which the Alabama Court of Appeals regarded as inviolate saying: "The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was

an inalienable property right possessed by the Pizitz store" (R. 63).

All of the petitioners were arrested on March 31, 1960. The facts developed on each of the five trials follows:

***Gober and Davis***

Petitioners Gober and Davis were arrested in Pizitz's Department Store by a police officer who had gone there in response to a report of a "disturbance" or "commotion" (R. 18). On direct examination by the City's attorney the officer was asked:

> "Q. When you got to the dining or eating area what did you find that was unusual or out of the ordinary? A. Well, I found that the cafeteria part was closed to all customers and I found two Negro males sitting in the eating part of the cafeteria" (R. 18).

When asked what they were doing the officer responded, "They were sitting there just talking to one another" (R. 19). No one said anything to either petitioner in the presence of the arresting officer (R. 19); and the officer did not speak to any personnel connected with the store in the presence of petitioners (R. 19). The report pursuant to which the officer acted came from his superior (R. 19-20). No member of the store requested the officer to arrest petitioners (R. 20).

In addition to the arresting officer, the controller of the store testified that he did not make any remark to petitioners (R. 21, 23) although an assistant to the president asked petitioners to leave the tea room area (R. 23). The president's assistant told petitioners they could be served in the Negro restaurant in the basement (R. 23). "He (the assistant to the president) told them it would be against the law to serve them there" (R. 24). At this point peti-

tioners' counsel developed the fact that there is an ordinance of the City of Birmingham requiring racial segregation in eating facilities (R. 24-25). The controller was then asked: "Q. Did you or any official at Pizitz's call the police? A. No sir" (R. 26). Once again he was asked: "Q. So far as you know, no official at Pizitz's had filed a complaint with the Police Department at that time? A. That is right" (R. 27).

Petitioner Davis, a student at Daniel Payne College (R. 28), testified that on the day in question he made purchases at Pizitz's and then attempted to obtain service in the lunch area (R. 43-44). The waitresses never came (R. 44). Davis and his companion, Gober (R. 50), were told by some unidentified person that they could be served in a place reserved for Negroes (R. 44-45). The lunch area was located on the mezzanine (R. 44). No sign indicated a racial restriction as to service (R. 44). Petitioners were not asked to leave the store or the place where they were sitting (R. 44). On cross-examination, it was established that petitioner Davis had gone to Reverend Shuttlesworth's house to be advised on March 30, 1960. Petitioner Gober was also there, as well as petitioners Hutchinson, King, Parker, Sanders, Walker, West, Westmoreland and Willis (R. 46-48).

> Q. You went there voluntarily? A. That is right.
>
> Q. Nobody solicited you to come there? A. That is right.
>
> Q. Nobody came to Daniel Payne College and asked for volunteers to go to the meeting? A. That is right.
>
> Q. How did you know about the meeting? A. We went there for advice. We went to his home.
>
> Q. Who did you go there with? A. Reverend Billups was on the campus and I asked him to take us over there if he was going to town and he did so (R. 47).

***Hutchinson and King***

Petitioners Hutchinson and King were arrested when they were sitting alone at a table in the dining area of Loveman's Department Store (R. 107-108). The arresting officer, Martin, was directed to go to Loveman's by another officer, Holt (R. 107). When Officer Martin arrived, he saw a rope from one post to another going up to the mezzanine or eating place with a sign marked closed (R. 107). There were no signs limiting the use of the facility to whites or Negroes (R. 108). There was no conversation with petitioners other than to tell them they were under arrest (R. 107). There was no disorder (R. 109) and no person connected with the store personally informed Martin that petitioners had been directed to leave (R. 108).

The concessionaire in charge of the food department who observed petitioners in the dining area on the day of their arrest had had no conversation with them (R. 109-110) but heard Mr. Kidd of the store's Protection Department tell petitioners to leave in the following manner: "He announced in general terms that the tea room was closed and for everyone to leave" (R. 110). According to this witness, petitioners remained seated along with other persons, who were white, until the police arrived. Lt. Pierce approached and asked him if he was the manager and said someone had called the police and had told them that there were "two people" in Loveman's "trying to be served," and he asked, "Where are they?" Mr. Schmid, the concessionaire, was asked whether there was any disturbance. His reply was, "It naturally is you know in this case" (R. 112). However, he did not call the police and he didn't know who called (R. 112). The waiters left the floor when petitioners seated themselves (R. 112). And when the officer came, the concessionaire left the floor (R. 113). About 25 white customers were still eating when the police arrived (R. 113). The store

detective, D. V. Kidd, announced to the whites seated on the mezzanine in the presence of petitioners that the store was being closed but did not speak directly to petitioners (R. 115). The officer did not arrest petitioners in his presence (R. 115). Mr. Kidd testified that in closing the food service the store manager hung up a sign saying closed (R. 117), but he (Kidd) did not see petitioners until the crowd dispersed, the milling crowd being the cause for closing (R. 117). He, too, admitted that no one connected with Loveman's Department Store called police (R. 118). He did not tell the officer anything other than the fact that people were milling around and he "found the two colored boys sitting there and we had closed the tea area" (R. 118).

The detective testified that there was a place on the 7th floor where Negroes may be served (R. 119); however, the policy of Loveman's regarding service of Negroes at the lunch tables was not known to this witness. He testified, ". . . . the policy of the store I do not know, I have never been informed in regard to that although on all of the occasions I visited the mezzanine I have never seen any colored eating on the mezzanine" (R. 121). The detective did not sign a complaint or affidavit for the arrest of these petitioners (R. 121-122).

On the other hand, the concessionaire testified that Loveman's has no separate accommodations for Negroes (R. 113). The two eating facilities, one in the basement and one in the mezzanine, are for white customers only (R. 113-114). Negroes are permitted to trade in the store which sells household goods, furnishings, notions, etc. (R. 114).

***Parker and West***

Petitioners Parker and West were arrested in Newberry's Department Store. Officer B. R. Myers arrived about 10:30 A. M. and saw "two colored males" seated at the lunch counter. He had no conversation with them or any store

official (R. 158-159). Petitioners had no conversation with any employees of Newberry's in the presence of the officer (R. 159). The officer arrested petitioners on the strength of a call which had been received from police headquarters to go to Newberry's (R. 159). The arresting officer understood that the complaint regarding petitioners' presence in Newberry's had been received by officer Stoddard from a man named Stallings of the department store (R. 160-161).

The store detective in Newberry's, Mrs. L. B. Gibbs, testified that she told petitioners West and Parker to leave (R. 162) and to go to the snack bar for colored on the 4th floor, but, "They said they were not leaving, that they were not violating any law" (R. 163). Newberry's has three lunch counters, one on the first floor and one in the basement for white customers only and one on the fourth floor for Negroes (R. 163). Lloyd L. Stallings, Assistant Store Manager, testified that he was called from his office by "someone" who said "there was a lot of confusion at the lunch counter" and would he come down. When he got down to the main floor he saw two colored men seated there (R. 164). He addressed petitioners as follows: "You know you can't do this . . . we have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there" (R. 164). In reply defendants said, "We have our rights." Mr. Stallings testified, however, that he did not call the police and doesn't know who did (R. 165). Even after the police arrived he made no complaint to them or subsequently and to his knowledge no one else connected with the store did either (R. 165).

Newberry's is a national chain store engaged in selling goods to the public (R. 165). Although the fourth floor lunch counter has a sign saying for colored only, the one on the first floor has no sign limiting service on racial grounds (R. 166). Negroes and whites, of course, shop at other depart-

ments on the first floor where this lunch counter is located (R. 166). When petitioners' counsel tried to develop the fact that Newberry's policy concerning Negroes is dependent upon the custom of the community, this testimony was ruled incompetent by the court and exception taken (R. 167-168).

Petitioner West testified that he met petitioner Parker on the date in question, made a couple of purchases and then invited Parker to go with him and have something to eat. They went to the lunch counter on the first floor. Other white persons were seated at the counter (R. 171). The waitress never came over to take their order and no one invited them to leave (R. 171). The arresting officer ordered the white people dining at the counter to get up. All of them did not leave (R. 172). Petitioner West then got up to leave and the arresting officer grabbed him from behind. He told petitioners they were under arrest but did not say what for (R. 172-173). This petitioner testified that he had expected to get service because he had been served at other counters without difficulty (R. 173).

***Sanders and Westmoreland***

Petitioners Sanders and Westmoreland were arrested as they sat alone in the basement lunchroom of Kress's 5 & 10¢ store (R. 208-209). Officer Caldwell arrived pursuant to a call from police headquarters (R. 208-209). The officer testified that the manager told him in the presence of petitioners that petitioners could not be served where they were seated and then turned out the lights and closed the counter (R. 209). Thereupon this officer arrested petitioners although the manager did not request the arrest or tell petitioners to leave the counter (R. 209-210). The lunch counter manager testified that he approached petitioners and told them they could not be served there and put up a closed sign. Petitioners were sitting at a counter in

one bay or section thereof when the manager turned off the lights. Petitioners then moved to another bay and the lights were turned off there (R. 211-212). One youth said, "We have our rights." The lunch counter manager then called the manager of the store. The store manager asked petitioners to leave but petitioners did not answer (R. 212). The police arrived as both managers turned away from the petitioners. It was intended only that petitioners leave the area, not the store (R. 213). Everyone left the counter when it was closed except an elderly woman who finished her sandwich. She remained after police arrived but was not arrested (R. 217). The lunch counter manager did not himself call the police, did not ask them to arrest petitioners, and did not sign an affidavit (R. 213).

Kress is also a department store selling to the general public (R. 214). No facilities are provided for colored customers (R. 215). Lunch counters at Kress are for customers who come into the store (R. 215). Negroes are served food at the lunch counters to carry out (R. 218), and buy equally and without discrimination at all other counters (R. 216).

***Walker and Willis***

Petitioners Walker and Willis were arrested in Woolworth's. The lunch counter there was on the first floor. The arresting officer, Richard Casey, testified that when he arrived the lights were turned out over the counter and Mrs. Evans, the manager was waiting for him (R. 251); that petitioners were seated at the counter. He had no conversation with them (R. 252) although Mrs. Evans told him that she had asked petitioners to leave, that the place was closed; that she then told petitioners the counter was closed, that they would have to leave (R. 252-253); and that there was no one else seated at the lunch counter at that

point (R. 253). The officer admitted that Mrs. Evans did not instruct him to arrest petitioners and no one else connected with the store did either (R. 253).

Petitioner Walker testified, on the other hand, that on the date in question he went to Woolworth's to purchase handkerchiefs and a birthday gift for a friend. He met petitioner Willis there who also made purchases (R. 255). They then went to the lunch counter but did not get a chance to order anything. They were refused service by the first waitress and just sat there until the police arrived (R. 256). He never saw the store manager, Mrs. Evans, until his trial in the Recorder's Court (R. 256). He was never asked to leave by anyone connected with the store. When the police arrived they requested the white customers seated at the counter to leave. A white man sitting next to petitioners refused to move, but the police required him to do so, although he was not arrested (R. 256). Petitioner Walker also testified that he saw officer Casey for the first time when he was taken outside of the store to the patrol car and that Casey was not the officer who had taken them out of the store. The counter contained no sign limiting service to "white or colored" (R. 257).

***Facts Common to Each Case***

The following significant facts appear in each of these cases:

1. The protest demonstration in each case took place in a department store where petitioners and all other members of the public were invited to trade, and did, at all counters except the lunch counter in question (Gober and Davis, R. 43-44, 50; Hutchinson and Davis 114, 119-120; Parker and West 165-166, 169, 170; Sanders and Westmoreland 214-216, 218; Walker and Willis 255-256, 257-258).

2. All of these petitioners sought to purchase food in an area of the premises where any member of the white public could make this purchase and where there was no sign limiting this purchase to white customers (Gober and Davis, R. 44-50; Hutchinson and King 108, 113; Parker and West 163, 166, 171; Sanders and Westmoreland 216, 218; Walker and Willis 257).

3. In each case it appears that the police arrived at the store, not pursuant to any call made by someone connected with the store, but pursuant to orders from police headquarters or a superior officer, arrested petitioners without being requested to make the arrest by any agent of the store, and petitioners were prosecuted by the City although no one connected with the store signed a complaint or affidavit upon which the prosecution was based (Gober and Davis, R. 19-20, 26-27; Hutchinson and King 107, 112, 113, 115, 118, 121-122; Parker and West 159-161, 165; Sanders and Westmoreland 210, 213; Walker and Willis 252-253, 254).

4. In no case is there evidence that the person requesting petitioners to leave the lunch area identified himself, or stated his authority to make the request, or requested petitioners to leave the store as opposed to the lunch area (Gober and Davis, R. 21, 23, 44-45; Hutchinson and King 110, 115-116; Parker and West 162, 171; Sanders and Westmoreland 209-210, 211, 213; Walker and Willis 252-253, 256).

5. In each case the charge was the same, i.e., petitioners "did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes . . . after being warned not to do so" (Gober, R. 2, Davis 73, Hutchinson 93, King 129, Parker 145, West 183, Sanders 195, Westmoreland 225, Walker 239, Willis 267).

6. Petitioners were at all times orderly (Gober and Davis, R. 19-20; Hutchinson and King 109, 117-118; Parker and West 158; Sanders and Westmoreland 209).

## Summary of Argument

### I.

Petitioners' convictions cannot stand consistently with the equal protection and due process imperatives of the Fourteenth Amendment. These convictions were, in reality, predicated on a city ordinance requiring racial segregation in eating facilities, buttressed by a massive state policy of racial segregation, the enforcement f which, as demonstrated by the records in these cases, clearly violates the equal protection clause of the Fourteenth Amendment. *Turner v. City of Memphis*, 369 U. S. 350. If the department stores' policy were the sole basis for these convictions, these convictions would nevertheless violate the equal protection clause of the Fourteenth Amendment since enforcement of such private discrimination was dependent upon the state's exertion of the full power of its judicial arm. *Shelley* v. *Kraemer*, 334 U. S. 1. There is no asserted invasion of the right of privacy in these cases. The premises in question were thrown open to the general public, including petitioners. *Marsh* v. *Alabama*, 326 U. S. 501. The premises are a part of the public life of the community, extensively regulated and licensed by the state, making state enforcement of racial segregation therein peculiarly repugnant to the requirements of equal protection. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 714. The property right asserted, which is a right to control the associations of customers at a public department store lunch counter, when all other counters are free from such control, is patently inconsequential when weighed against the high

purposes of the Fourteenth Amendment. The state cannot claim the right to enforce racial segregation in a public department store where the segregation has been generated by state policy and the state has failed to protect its citizens, for whose benefit the Fourteenth Amendment was adopted, with respect to equal access to public accommodations. The decision in the *Civil Rights Cases*, 109 U. S. 3, was predicated on the assumption that the states had provided such protection.

## II.

The due process guarantees of the Fourteenth Amendment require reversal of these convictions as infringements upon freedom of speech. Petitioners here sought peacefully to persuade the owners of department stores to serve them on the same terms and conditions applicable to white customers. Their efforts at persuasion took the form of a non-verbal demonstration called a "sit-in". The protest was entirely appropriate to the circumstances, including the use to which the property had been dedicated by the owners. The owners chose to endure the controversy, rather than call the police, demand arrest, or file a formal complaint, by letting the petitioners remain seated at the lunch counter or by closing it to all customers. Their expression was not in such circumstances or of such a nature as to pose a clear and present danger of any substantive evil which Alabama had a right to proscribe. The ordinance, for violation of which petitioners were actually convicted, is unreasonably vague and, therefore, offends the due process clause of the Fourteenth Amendment. The ordinance was construed by the Alabama courts to uphold convictions obtained without proof that petitioners were requested to leave by a person who had established his or her authority to issue the request when same was made. Due process requires more notice that the law will exact a penalty under the circumstances of this case.

# ARGUMENT

## I.

## Alabama's Judgments in These Cases Are Inconsistent With the Constitutional Mandate of Equal Protection.

### A. Petitioners' Convictions Were Decreed by Birmingham's Restaurant Segregation Ordinance.

The constitutional command—"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws"—is an injunction against state decreed exclusion of Negroes from eating facilities. *Turner* v. *City of Memphis*, 369 U. S. 350; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Boynton* v. *Virginia*, 364 U. S. 454. However, notwithstanding these recent decisions by this Court, and the frequency with which this Court has invoked this prohibition against various other manifestations of state enforced racial segregation, *Bailey* v. *Patterson*, 369 U. S. 31; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; *Aaron* v. *Cooper*, 358 U. S. 1; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Brown* v. *Board of Education of Topeka*, 347 U. S. 483; *Barrows* v. *Jackson*, 346 U. S. 249; *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala. 1949) aff'd 336 U. S. 933; *Shelley* v. *Kraemer*, 334 U. S. 1; *Buchanan* v. *Warley*, 245 U. S. 60, petitioners have been convicted by the courts of Alabama. Their crime: as Negroes they sat at a white department store lunch counter requesting service. If petitioners had been white, and their conduct identical, they would not have suffered the same fate.

Alabama's racial policies are a matter of common and historical knowledge still clearly defined by statute and ordinance. In this case, §369, General Code of Birmingham, 1944, makes it "unlawful to conduct a restaurant or

other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment."

In apparent compliance with this ordinance, Pizitz's Department Store provides a food service for its white customers on the mezzanine (R. 44) and a separate food service for its Negro customers in the basement (R. 24). The food concessionaire at Loveman's Department Store testified that there are two food areas in Loveman's, one on the mezzanine and one in the basement, both for white customers only (R. 114). On the other hand, the store detective testified that on the seventh floor there was a place where Negroes "may" be served food (R. 119). Newberry's has two lunch counters for its white customers, one on the first floor, the other in the basement (R. 163). Colored customers are served on the fourth floor (R. 163). Kress's 5 and 10¢ Store has a luncheon area in the basement for its white customers. Negroes are permitted to purchase food at this counter to take out; they are not permitted to sit down and eat (R. 218). Woolworth's has a lunch counter on the first floor for white persons only (R. 251, 256).

Consequently, as each arresting officer entered the department store and saw "two Negro males" seated at a lunch counter customarily serving whites only, this, without further explanation, was cause for arrest.

The City's attorney said to the arresting officer in the first case:

"Q. When you got to the dining or eating area what did you find that was unusual or out of the ordinary?
A. Well, I found that the cafeteria part was closed

to all customers and I found two Negro males seated in the eating part of the cafeteria" (R. 18).

In the second case, the police officer who made the arrest simply observed as he entered the store that, "two Negro boys" were sitting "to the right of the Cashier's cage at the tables there where food is served" (R. 107) with whom he had no conversation "other than to tell them they were under arrest" (R. 107).

Again, in the third case, the arresting officer was asked:

"Q. Did you find anything out of the ordinary there at that time?" [when he entered the store] A. Two colored males were sitting at the luncheon counter" (R. 158).

Similarly, in the fourth case, the officer was queried as follows:

"Q. What did you observe if anything unusual on that occasion? A. Officer Thompson and I went downstairs in the basement. The lunch counter was closed. The lights were out. We observed two black males, Roosevelt Westmoreland and Robert D. Sanders, sitting there" (R. 209).

And finally, in the last case, the officer was asked:

"Q. Did you observe anything usual or out of the ordinary on that occasion? A. The lights were out over the luncheon counter and there were two Negro males seated at the counter. Mrs. Evans was waiting there for the officer" (R. 251).

The records in these cases clearly demonstrate that the racial policy being enforced here was that of the City and not that of the owners of the premises.

The records disclose first that in each instance the police arrived pursuant to their own volition and not pursuant to any call from the owner of the premises or one of his agents (R. 26, 112, 165, 212-213, 252).

Second, the evidence is uncontradicted that in no case was the officer requested by an employee of the store to arrest petitioners (R. 26, 121, 165, 213, 253).

Moreover, the prosecutions of petitioners were not predicated on any formal complaint or affidavit filed by any person connected with the stores (R. 26, 121-122, 165, 213-214, 253).

In the first case, involving Pizitz's Department Store, the assistant to the president in requesting petitioners to leave the tea room "told them it would be against the law to serve them there" (R. 24). Petitioners' counsel then advised the trial court:

> "It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the segregation law and not because of Pizitz's policy" (R. 24).

The court did not permit the development of this theory (R. 24-26).

A similar effort by petitioners' counsel in another case to develop the fact that the exclusion from the dining area was not required by the policy of the store, as distinct from the policy of the city, also was restrained by the court. Petitioners' counsel queried:

> "Q. Does Newberry's have a policy of serving and not serving persons of another race or particular color?" (R. 166).

This question was objected to as incompetent, irrelevant and immaterial (R. 167). In sustaining the objection the court said:

> "Can we adjudicate cases here on persons or corporations' policies?" (R. 167) " * * * We can't. I pointed that out this morning. We are not dealing with policies of stores. We are dealing with a city code" (R. 167).

In the case involving Loveman's department store, the store detective who had notified the people to leave the dining area when he noticed people were milling around (R. 114-115) and after doing so noticed the petitioners in that case, Hutchinson and King, sitting at the table (R. 117), was specifically questioned regarding Loveman's policy of serving Negroes:

> "Q. Do you know have they been told not to come and eat in the tea room at Loveman's?"
>
> * * * * * *
>
> "A. Well in my short time I have been there I have never, the policy of the store I do not know, I have never been informed in regard to that although on all of the occasions I visited the mezzanine I have never seen any colored eating on the mezzanine" (R. 121).

Perhaps the most significant fact developed by petitioners' counsel relating to the question whether a City segregation ordinance was being adhered to by the owners of the premises was the fact that in each of the department stores petitioners were accommodated at all counters except the food service counters (R. 43-44, 50; 114-119-120; 165-166, 169-170; 214-216, 218; 255-256, 257-258).

The testimony in these cases leaves no doubt that the owners of the premises did not demand arrest and prosecution of petitioners. Their method of resolving the controversy was simply to close the counters or let petitioners just sit there (R. 18, 107, 164, 209, 251). They obviously did not desire to incur the risk of losing their Negro trade since in each case they requested only that these Negro customers leave that particular counter or area, not the store (R. 45, 115-116, 162, 213, 253).

Petitioners were therefore arrested, charged, prosecuted, convicted, and sentenced by the City of Birmingham in order to enforce its unequivocal policy of racial discrimination in eating facilities set forth in §369 of the City's Code.*

**B. Petitioners' Convictions Were Decreed by a Massive State Segregation Policy.**

Birmingham's racial segregation edicts as expressed by ordinance have not been limited to restaurants. Recently, in *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 59 (N. D. Ala. 1961) an ordinance requiring racial segregation in recreational facilities was held constitutionally void on equal protection grounds. An ordinance restricting the areas in which Birmingham Negroes might live earlier met a similar demise. *Monk* v. *City of Birmingham*, 87 F. Supp. 538 (N. D. Ala. 1949), aff'd 185 F. 2d 859, cert. den. 341 U. S. 940. Even in the absence of an ordinance, segregation has been enforced as a matter of policy, custom, usage and arrest, *Baldwin* v. *Morgan*, 251 F. 2d 780 (5th Cir. 1958), as well as regulation, *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960).

* Ordinances of the City of Birmingham are judicially noticeable by the Alabama courts. Code of Alabama, Recompiled 1958, Title 7, §429(1).

Also operative here was an equally affirmative state policy of racial segregation in many other areas clearly defined by statute. Alabama is, of course, one of the southern states in which there is still complete racial segregation at every level of public education, despite the repeal of school segregation laws in 1956,[1] replaced by a state pupil assignment law, see, *Shuttlesworth* v. *Board of Education*, 162 F. Supp. 372 (N. D. Ala. 58 aff'd 358 U. S. 101), which has produced no desegregation.[2] There can be no intermarriage between the races in Alabama.[3] Adultery and fornication between Negroes and whites is a special crime.[4] State policy requires the segregation of paupers,[5] prisoners,[6] railroad waiting rooms,[7] railroad coaches,[8] motor busses,[9] accounts of poll taxes paid by each race,[10] delinquents,[11] tubercular patients,[12] and residents of mental institutions.[13]

Consequently, involved in this case is the enforcement of state policy expressed in a city ordinance and buttressed by

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[1] Ala. Const., Art. 14, §256.

[2] *Southern School News*, August 1960, Vol. 9, No. 2, p. 1.

[3] *Green* v. *State*, 58 Ala. 190.

[4] Ala. Code, Recompiled, 1958, Title 14-360.

[5] *Id.* Title 44-10.

[6] *Id.* Title 45-52 and 121-3.

[7] *Id.* Title 48-186.

[8] *Id.* Title 48-196-198.

[9] *Id.* Title 48-301 (31a) to (31c) held unconstitutional in *Browder* v. *Gayle*, 142 F. Supp. 707, aff'd 352 U. S. 903.

[10] *Id.* Title 51-244.

[11] *Id.* Title 52-613 (1).

[12] *Id.* Title 45 §4

[13] *Id.* Title 45 §248.

a network of state segregation statutes. But if there is anything which is proscribed by the equal protection clause of the Fourteenth Amendment to the Federal Constitution, it is the enforcement of an affirmative state policy of racial segregation. And when, as here, it is enforced by the executive and judicial arms of the state, via arrest, prosecution, conviction and sentence for trespass after warning, consisting of refusal to leave a white department store lunch counter, the Fourteenth Amendment's injunction clearly applies. *Shelley* v. *Kraemer*, 334 U. S. 1.

**C. State Enforcement of Private Racial Discrimination Is Likewise Proscribed by the Fourteenth Amendment.**

Birmingham's segregation ordinance, by its terms, does not place any criminal liability on petitioners. The ordinance makes it unlawful to operate a restaurant which is nonsegregated. Consequently, in each of these cases, the City complained that these petitioners "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as .....", after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944."

The City's attorney contended on the trial that there was nothing more involved here than the enforcement of this ordinance. "I want to object to the references to the segregation ordinance. This ordinance has nothing to do with the matter of segregation and applies to anybody on the premises of another who is asked to leave and refuses. Segregation is not mentioned in the ordinance" (R. 26).

But in every case, the City introduced evidence to prove that petitioners were asked by some employee of the store

to leave the dining area reserved for white customers (R. 21, 115, 162, 211, 252-253).

The record is thus clear that the City was fully aware that the enforcement of racial segregation was involved in its prosecution of petitioners.

Petitioners' convictions were affirmed by the Court of Appeals of Alabama as against a Fourteenth Amendment equal protection claim on the ground that the department store had "a full right to limit the use of its own premises as it saw fit" (R. 63). But, *Shelley* v. *Kraemer*, 334 U. S. 1, teaches that although there may, in some circumstances, be a personal privilege to discriminate on the grounds of race, this privilege may be exercised only so long as it does not require the assistance of the state for its effectuation. Discrimination on the part of a private individual becomes state action at the point at which the state becomes involved. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. And the fact that such discrimination is enforced by the judicial arm of the state acting as a "neutral" referee does not preclude application of the Fourteenth Amendment's prohibition. *Shelley* v. *Kraemer*, *supra*. See also, *Barrows* v. *Jackson*, 341 U. S. 524; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 499, 463. The Fourteenth Amendment also has been invoked against racial discrimination on the part of the police. *Taylor* v. *Louisiana*, 370 U. S. 154; *Monroe* v. *Pape*, 365 U. S. 167; *Screws* v. *United States*, 325 U. S. 91. The only private discrimination outside the scope of the Fourteenth Amendment is that which is "unsupported by state authority in the shape of laws, customs or judicial or executive proceedings" or "not sanctioned in some way by the state." *Civil Rights Cases*, 109 U. S. 3, 17. Clearly within the scope of that amendment is "state laws or state proceedings," *Civil Rights Cases*, *supra*, at pp. 11, 23.

These convictions are void not only because they fly in the face of the Fourteenth Amendment's prohibitions, but they deprive petitioners of rights secured to them by laws enacted by the Congress to enforce the provisions of that Amendment. Title 42, United States Code, §§1981, 1982 and 1983. Section 1981 provides, "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * *." This is a case, therefore, where "the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York*, 332 U. S. 261, 282-283.

In any event, the City's segregation ordinance and the massive state racist policy of which that ordinance is a part, precludes any suggestion that here the department store owners acted privately, unsanctioned by the state. In the context of this case, the department store's "preference does not make the action 'private,' rather than 'state,' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise." *Garner* v. *Louisiana*, 368 U. S. 157, 181 (Mr. Justice Douglas concurring).

The Court of Appeals of Alabama ruled that the appellant "would destroy [the department store's] property right by attempting to misapply the Fourteenth Amendment, ignoring the provision in that Amendment that grants the right to a private property owner to the full use of his

property, . . . " (R. 63). Significantly enough, the state does not claim that it prosecuted petitioners to secure the owner's interest in privacy. Such a claim would be inconsistent with the obvious fact that the owner of the premises here has thrown them open to the public, including petitioners, for his own profit. Any suggestion that some exception to the *Shelley* rule should be made for a corporation which has sought state aid in enforcing racial discrimination in its premises open to the general public for profit, because somehow the inviolability of a private home may be impaired, is without merit. If this case involved the enforcement of a trespass law to protect a real interest in privacy, as opposed to the situation here, obviously a different result might obtain because of the importance of the right of privacy which this Court has protected in other contexts. *Breard* v. *Alexandria*, 341 U. S. 622, 626, 644; *Kovacs* v. *Cooper*, 336 U. S. 77. But in *Martin* v. *Struthers*, 319 U. S. 141, this Court weighed the privacy consideration against the competing constitutional right of freedom of religion and ruled in favor of the latter.[14] In these cases, the right to be free from state enforced racial segregation such as is evidenced by these records is not competing with any other interest which the state may have in protecting privacy.[15]

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[14] And see *Watchtower Bible and Tract Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433 (1948), in which the New York courts distinguished between the right to solicit in the streets of a large scale housing project and to go, without invitation, into the hallways to visit private apartments.

[15] To weigh considerations of privacy in a case involving racial discrimination would comport with the views of the framers of the Fourteenth Amendment. During the debate on the bill to amend the *Civil Rights Act* of 1866, 14 Stat. 27, which served as the precursor to the *Civil Rights Act* of 1875, 18 Stat. 335, Senator Sumner distinguished between a man's home and places and facilities of public accommodation licensed by law: "Each person, whether Senator or citizen, is always free to choose who shall be his

**D. No Essential Property Right of the Department Store Is Infringed Here.**

In affirming the convictions of petitioners the Court of Appeals of Alabama ruled that the petitioners' Fourteenth Amendment claims would do violence to the property rights of the store owners: "The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was an inalienable property right possessed by" the department stores (R. 63). The Alabama court would thus distinguish these cases from those in which this Court invoked the prohibitions of the Fourteenth Amendment

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friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; * * * but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of *Equality;* nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality in the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say that *Equality in all institutions created or regulated by law* is as little a question of society" (emphasis added). After quoting Holingshed, Story, Kent, and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner then said: "As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it be with the theater and other places of public amusement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." Cong. Globe, 42d Cong., 2d Sess. 382-383 (1872). It is not unreasonable that considerations of privacy should weigh so heavily. The right of privacy against intrusion on one's premises or into one's personal affairs, 4 Blackstone's Commentaries Ch. 13, §5(6) (Wendell's Ed. 1850), was recognized at common law, and is recognized generally in American law. See A. L. I., *Restatement of Torts*, §867 (1939). This Court has recently reiterated that the due process clause protects privacy against intrusion by the States. *Mapp* v. *Ohio*, 367 U. S. 643, 654, 655; *Wolf* v. *Colorado*, 338 U. S. 25, 27-28. Cf. *Gilbert* v. *Minnesota*, 254 U. S. 325, 336 (Justice Brandeis dissenting); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 464, 468.

against state enforcement of racial segregation by proclaiming the rights involved here to be wholly and solely the inalienable property rights of the store owners.

For this reason, a reexamination of the property right asserted here is required. States can and do prohibit racial discrimination in public eating places without offending any constitutionally protected property rights.[16] Notwithstanding the prohibitions of the Fourteenth Amendment, Alabama has imposed the requirement of racial segregation on private property owners as evidenced by the restaurant segregation ordinance in this case. Consequently, the claimed inviolate property right to discriminate as one desires on his property is not quite so absolute and inalienable as Alabama claims. "[T]he power of the state to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334 U. S. 122 citing *Marsh* v. *Alabama*, 326 U. S. 501. In the *Marsh* case, *supra*, at 506, this Court ruled: "The more an owner for his benefit opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Co.* v. *Labor Board*, 324, U. S. 793, 798, 802 n. 8." No claim is made here that the Fourteenth Amendment forbids a state to assist in the enforcement of property rights, *per se*. Obviously the state has an obligation not to engage in or assist in the invasion of the privacy of the home. Considerations of privacy discussed in more detail,

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[16] See *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28; Konvitz & Leskes, *A Century of Civil Rights* 172-177 (1961).

*supra* pp. 27-29, afford a basis for distinguishing between permissible and impermissible state action in this area.

Since "property or ownership" is, as Mr. Justice Cardozo has written, a "bundle of privileges," *Hanneford* v. *Silas Mason Co.*, 300 U. S. 577, 582, or as stated elsewhere, "a group or bundle of rights" given by the state, Blodgett, *Comparative Economic Systems* 24 (1944), it matters a great deal which of the rights or privileges constituting the owner's property was enforced in this prosecution. Various characteristics of the property interest demonstrate that this case should not depart from the general rule that states may not support racial discrimination.

The asserted property interest is but a claimed right to control the conduct and associations of others. But this claimed right is clearly separable from other incidents of ownership of the property such as fixing prices, choosing merchandise for sale, setting hours of business, selling the business or closing it down, to name but a few.

The power to regulate the conduct and associations of others has never been an unrestrained property right. Illustrations include limitations that the law has placed on those who would use their property to control the conduct of donees, as by requiring divorce or separation,[17] or with respect to marriage,[18] restrictions compelling separation of

[17] Provisions requiring divorce or separation were held void in: *Dwyer* v. *Kuchler*, 116 N. J. Eq. 426, 174 Atl. 154 (Ch. 1934); *In Re Haight's Will*, 51 App. Div. 310, 64 N. Y. S. 1029 (2d Dept. 1900); *Davidson* v. *Wilmington Trust Co.*, 23 Del. Ch. 1; 2 A. 2d 285 (Ch. 1938); *Winterland* v. *Winterland*, 389 Ill. 384, 59 N. E. 2d 661 (1945); *Hawke* v. *Euyhast*, 30 Neb. 149, 46 N. W. 422 (1890); *Cruger* v. *Phelps*, 21 Misc. 252, 47 N. Y. S. 61 (Sup. Ct. 1897).

[18] Certain marriage clauses have been held ineffective, 6 Powell, *Real Property* ¶851; A. L. I., *Restatement of Property*, §424 (1944); *Maddox* v. *Maddox, Adm'r*, 52 Va. 804 (1954).

a child from its parents,[19] and requirements controlling certain personal habits.[20]

The power to impose restraints on alienation has been severely limited by courts and legislatures.[21] Restrictive covenants have been limited by common law.[22] Their enforcement in courts of equity[23] and courts of law[24] has been forbidden by the Fourteenth Amendment where race was the reason for the restriction. And, of course, the rule against perpetuities is of ancient lineage.[25]

A business man is not always free to set his own prices. Fair trade acts on the one hand, approved by the Miller-Tydings Act amendment of §1 of the Sherman Act, 15 U. S. C. §1; require some businessmen to sell at fixed prices.

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[19] Restrictions which compel the separation of a minor child from its parent have not been viewed with favor. 6 Powell, *Real Property* ¶858, at 64; *In Re Carple's Estate*, 140 Misc. 459, 250 N. Y. S. 680 (Surr. Ct. 1931); *In Re Forte's Will*, 149 Misc. 327, 267 N. Y. S. 603 (Surr. Ct. 1933); *In Re Rooney's Estate*, 161 Misc. 626, 292 N. Y. S. 476 (Surr. Ct. 1936).

[20] *Holmes* v. *Connecticut Trust & Safe Deposit Co.*, 92 Conn. 507, 103 Atl. 640 (1918) (condition that conveyee's husband abstain from tobacco and liquor held void); cf. *D'Arcangelo* v. *D'Arcangelo*, 137 N. J. Eq. 63, 43 A. 2d 169 (Ch. 1945) (legatee must employ testator's brother as bus driver, at designated salary for a corporation in which legatee had received an interest; invalidated).

[21] Gray, *Restraints on the Alienation of Property* §259 (2d ed. 1895); A. L. I., *Restatement of Property*, Div. 4, Social Restrictions Imposed Upon the Creation of Property Interests 2121 (1944); Browder, *Illegal Conditions and Limitations: Miscellaneous Provisions*, 2 Okla. L. Rev. 237 (1948).

[22] *Porter* v. *Barrett*, 233 Mich. 373, 206 N. W. 532 (1925).

[23] *Shelley* v. *Kraemer*, 334 U. S. 1.

[24] *Barrows* v. *Jackson*, 346 U. S. 249.

[25] Gray, *The Rule Against Perpetuities* §201 (4th ed. 1942); 6 Powell, *Real Property*, ¶¶759-827; Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938).

Anti-trust concepts on the other hand, originating in the common law, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U. S. 211 (1899), and embodied in the statutes of the United States, Robinson-Patman Act, 15 U. S. C. §13 *et seq.*; Clayton Act, 15 U. S. C. §12 *et seq.*; Sherman Anti-Trust Act, 15 U. S. C. §1 *et seq.*, have condemned price discrimination, price fixing, and conspiracies to fix resale prices. The right to select customers has also been curtailed by the antitrust laws,[26] as well as common law, and even the right of a single trader has been greatly limited.[27]

Numerous statutes and ordinances limit property holders in their power to refuse to sell or rent on grounds of race or color[28] or to refuse to serve patrons in public accom-

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[26] *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959); *Lorain Journal Co.* v. *U. S.*, 342 U. S. 143 (1951).

[27] *United States* v. *Colgate*, 250 U. S. 300 (1919); See *U. S.* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); Rankin, *The Parke, Davis Case*, 1961 Antitrust Law Symposium, New York State Bar Association Section on Antitrust Law 63 (1961).

[28] Cal. Health & Safety Code §35740; Mass. G. L. c. 151B, §6 (Supp. 1961); N. J. Stat. Ann. §18:25-4 (Supp. 1961); Wash. Rev. Code §§49.60.030, 49.60.040 (1957); Cal. Civil Code, §51 (Supp. 1961); Colo. Rev. Stat. Ann. §§69-7-1, to 69-7-7 (Supp. 1960); Conn. Stat. Rev. §53-35 (Supp. 1960); Mass. Gen. L. c. 151B, §4 (Supp. 1961), as amended by Acts, 1961, c. 128; Minn. Stat. Ann. §§363.01-.13, as amended by L. 1961, c. 428 to become effective in 12/31/62; Ore. Rev. Stat. §659.033 (1959); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. Y. Executive Law, §290 (Supp. 1962); Pa. Stat. Ann., tit. 43, §953 (Supp. 1961). Cases holding some of the ordinances and statutes constitutional are: *Levitt & Sons, Inc.* v. *Division Against Discrimination*, 31 N. J. 514, 158 A. 2d 177 (1960); *Mass. Comm'n Against Discrimination* v. *Colangelo*, 30 U. S. L. W. 2608 (Mass. 1962); *State Comm'n Against Discrimination* v. *Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (Sup. Ct. 1958).

modations on the grounds of race or color.[29] Historically, the right to select customers has been limited by common law and statute.[30] It is well known that innkeepers and carriers do not have freedom arbitrarily to select or reject patrons. Beale, *The Law of Innkeepers and Hotels* (1906).

The foregoing limitations on the power to control the conduct and associations of others describe particular examples of the general principle that "property rights" are not "sacred" and "inalienable" in the sense that common law, statute, and constitution may not limit or shape them where they have harmful public consequences. Further

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[29] Cal. Civil Code, §§51-52 (Supp. 1960); Colo. Rev. Stat. Ann. 25—1—1 *et seq.* (1953); Conn. Gen. Stat Rev. §53-35 (Supp. 1961); D. C. Code §47-2901 *et seq.* (Supp. 1960); Indiana Stat. Ann. §§10-901, 10-902 (Supp. 1962); Iowa Code Ann. §735.1 (1950); Kansas Gen. Stat. Ann. §21-2424 (1949); Mass. Gen. L. c. 272, §§92A, 98 (1956); Mich. Stat. Ann. §28.343 (Supp. 1959); Minn. Stat. Ann. §327.09 (1947); Mont. Rev. Codes §64-211 (Supp. 1961); Neb. Rev. Stat. §§20-101, 102 (1943); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960); N. M. Stat. Ann. §§49-8-1 to 49-8-6 (Supp. 1961); N. Y. Civil Rights Law §40 (1948); Executive Law, §§292(9), 296(2) (Supp. 1962); N. D. Cent. Code, §12-22-30 (Supp. 1961); Ohio Rev. Code §4112.02(G) (Supp. 1961); Ore. Rev. Stat. §§30.670-.680, as amended by L. 1961 c. 247; Pa. Stat. Ann., tit. 18, §4654, as amended by Act No. 19 (1961); R. I. Gen. Laws §§11-24-1 to 11-24-6 (1956); Vt. Stat. Ann., tit. 13, §§1451, 1452 (1958); Wash. Rev. Code, §§49.60.040, 49.60.215 (1962); Wis. Stat. Ann. §924.04 (1958), as amended (Supp. 1962); Wyo. Stat. §§6-83.1, 6-83.2 (Supp. 1961).

[30] Mund, "The Right to Buy—And Its Denial to Small Business," Senate Document #32, 85th Cong., 1st Sess., Select Committee on Small Business (1957); Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135 (1914); Statute of Labourers, 25 Ed. III, Stat. 1 (1350) (no one could refuse to practice his calling to whomsoever applied). The following statutes penalized a businessman's refusal to serve all comers: (1357), 31 Ed. III, c. 10 (victualers); (1360), 35 Ed. III (fishermen); (1433), 11 Hen. VI, c. 12 (chandlers); (1464), 4 Ed. IV, c. 7 (shoemakers); *Lane* v. *Cotton*, 1 Ld. Raym. 646, 655; 1 Salk. 18, 19; 12 Mod. 472, 485 ("If a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies . . .").

examples indicate different aspects of this thoroughly settled, fundamental legal truth. Property owners have been compelled to destroy valuable cedar forests which harbored fungus threatening neighboring apple orchards,[31] to spend funds to install fire extinguishing equipment,[32] to limit the size of billboards,[33] and to make loaves of bread a certain size.[34] Moreover, employers have been compelled to allow labor organizational activities to be conducted on their property.[35]

And only recently property owners have been forbidden to use their property in a way which would intimidate Negro lessees in the exercise of the right to vote. *United States* v. *Beaty*, 288 F. 2d 653 (5th Cir. 1961).

Other facets of the claimed property right to discrimination on the basis of race in these circumstances are clearly separable from the core of the owner's interest in its business. In addition to the fact that no privacy has been intruded upon, the asserted property right did not seek to protect the premises from a use alien to their intended function. Petitioners sought only to use the premises and consume food in an area provided for such activity. The asserted right to exclude expressed only a preference for racial segregation and not any objection to petitioners' demeanor or conduct. The capricious nature of discrimination is highlighted by the fact that in one store, Kress' 5 & 10, there is a luncheonette in the basement where

[31] *Miller* v. *Schoene*, 276 U. S. 272 (1928).

[32] *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946).

[33] *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935); *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269 (1919); *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526 (1917).

[34] *Schmidinger* v. *Chicago*, 226 U. S. 578.

[35] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1955); *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793 (1945).

Negroes are permitted to purchase food to take out but are not permitted to sit down and eat (R. 218).

As in *Shelley* v. *Kraemer*, 334 U. S. 1, 10, the restaurant did not limit the type of use made of the premises, nor the type of persons or conduct permitted thereon. The restriction referred only to race. Moreover, the property interest enforced below attempted only to achieve discrimination in premises thrown open by the owner to the general public, including petitioners, for his own business advantage. Cf. *Marsh* v. *Alabama*, 326 U. S. 501, 506. The specific area within the store in dispute, i.e., the lunch counter, was a public part of the premises and an integral part of a single commercial establishment serving the public. Consequently, the property interest enforced below is simply a claimed right to enforce racial discrimination in very particular circumstances. It obviously is not true that refusal to enforce this asserted incident of ownership destroys the whole bundle of rights. That result would be contrary to the entire genius of our jurisprudence. The premise that the stores own the property does not lead to the ultimate logical extreme that they may absolutely control the conduct and association of others in the store. Mr. Justice Holmes has written that, "All rights tend to declare themselves absolute to their logical extreme yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 345, 355. Only last term Mr. Justice Frankfurter, dissenting, pointed out the indubitable truth, "That an end of discrimination against the Negro was the compelling motive of the Civil War Amendments: The Fifteenth expresses this in terms and it is no less true of the Equal Protection Clause of the

Fourteenth." *Baker* v. *Carr*, 369 U. S. 186, 285-286. In these cases the department stores property rights are limited by the Fourteenth Amendment and do not reach the constitutionally untenable, logical extreme that the states may aid the stores in upholding racism. "The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of other individuals." *Shelley* v. *Kraemer*, 324 U. S. 1, 22.

**E. The State May Not Arrest and Convict Petitioners for Having Violated the State's Segregation Policy in Premises in Which the State Is Deeply Involved Through Its Licensing and Regulatory Powers.**

The all pervading nature of the state's involvement—evidenced by extensive regulation and licensing—in the premises where petitioners were arrested for violating the state's racial segregation policy demonstrates even further the necessity for invalidating the judgments below. Discrimination here has been enforced in an area of public life with which the state is so intimately involved that the department stores lunch counters are by law extensively licensed and regulated. The extensive public character of the enterprise is revealed not only by the fact that the stores serve the general public but by the interest which the state has demonstrated in that service. There is detailed regulation of business corporations of the type involved here under Alabama law.[36] Dispensing of food in Birmingham also is extensively regulated,[37] including inspection of premises and the issuing of permits by the Health Department.[38]

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[36] Code of Alabama, Recompiled 1958, Title 10, §§1 to 263.

[37] General City Code Birmingham, 1944, Ch. 14.

[38] *Id.* §§348 and 376(a).

Alabama imposes a restaurant license tax,[39] requires a soft drink retailer's license,[40] stores generally must be licensed,[41] and of course there are health laws and regulations for the operation of food handling establishments under state laws.[42] As Mr. Justice Douglas wrote in *Garner v. Louisiana*, 368 U. S. at 183-84:

> A state may not require segregation of the races on conventional public utilities any more than it can segregate them in ordinary public facilities. As stated by the court in Boman v. Birmingham Transit Co. (C. A. 5 Ala.), 280 F. 2d 531, 535, a public utility "is doing something the state deems useful for the public necessity or convenience." It was this idea that the first Mr. Justice Harlan, dissenting in Plessy v. Ferguson, . . . advanced. Though a common carrier is private enterprise, "its work" he maintained is public. *Id.* 163 U. S. at 554. And there can be no difference, in my view, between one kind of business that is regulated in the public interest and another kind so far as the problem of racial segregation is concerned. I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment.

In *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, this Court found sufficient governmental responsibility to re-

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[39] Code of Alabama, Recompiled 1958, Title 51, §582.

[40] *Id.* Title 51, Section 482.

[41] *Id.* Title 51, Sections 620-629.

[42] *Id.* Title 22, Section 85.

quire decision of a Fifth Amendment due process claim where the principal governmental involvement was a decision by a regulatory body to do nothing about private activity (radio broadcast on streetcars) it could have prohibited. The lunch counter in this case is also regulated by government, although perhaps not so closely as the streetcar company in *Pollak*. But this case has an element that the *Pollak* case did not, i.e., that government has done so much to encourage racial segregation in public life that it must share responsibility for the discriminatory rule.

And see *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U. S. 192; *Nixon* v. *Condon*, 286 U. S. 73; *Betts* v. *Easley*, 161 Kans. 459, 169 P. 2d 831. In each of these cases, State initiative and licensing in establishing and maintaining the enterprise led to a holding or implication that the Fifth or Fourteenth Amendments forbid racial discrimination.

Here, indeed, is a case where the State "to some significant extent" in many meaningful "manifestations has been found to have become involved. . . . " *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

**F. These Convictions Must Be Reversed Since, in Addition to the Foregoing, Alabama Has Failed to Protect Petitioners' Rights to Equal Access to Public Accommodations.**

In the preceding sections of this brief, petitioners have established a basis for reversal of their convictions on several grounds: enforcement of a city ordinance requiring racial segregation, buttressed by a massive state segregation policy, state enforcement of private racial discrimination, enforcement of an arbitrary property claim, and elaborate state initiative and involvement in the enterprise and its maintenance. To these grounds for reversal should be added the states' failure to provide equal

protection of the laws to petitioners in their right to equal access to public accommodations. Alabama has failed to provide what the *Civil Rights Cases* assumed the states did provide: "a right to enjoy equal accommodations and privileges" which this Court termed "one of the essential rights of the citizen which no state can interfere with." 109 U. S. at 19.

This Court has recognized that failure or refusal of a state to act can deny the equal protection of the laws. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725; *Terry* v. *Adams*, 345 U. S. 461, 469; *Truax* v. *Corrigan*, 257 U. S. 312; see *Lynch* v. *United States*, 189 F. 2d 476 (5th Cir. 1951); *Catlette* v. *United States*, 132 F. 2d 902 (4th Cir. 1943).

Indeed, it is questionable whether the verbal concept of "state action" in equal protection cases rests on more than a misunderstanding,[43] for the phrase, no state shall deny equal protection, refers even more naturally to state inaction than to state action.

Mr. Justice Woods, a member of the majority of the *Civil Rights Cases*, stated in *United States* v. *Hall*, 26 Fed. Cas. 79, 81 (No. 15,282 1871):

> Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.

His concurrence with the majority in the *Civil Rights Cases* may, therefore, be explained by his agreement with their

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[43] See, generally, Mr. Justice Harlan dissenting in *Civil Rights Cases*, 109 U. S. 3, 26-62.

assumption that remedies against the discrimination in those cases existed under state law.

This indeed was a view held by some of the legislators concerned with the scope of the Amendment at or around the time of its passage. For example, Representative Wilson of Indiana in debates on the Enforcement Act of April 20, 1871, 17 Stat. 13, argued that the states were under an obligation to assure equality and that failure to do so was a denial of equal protection:

1. The provisions 'no State shall deny' and 'Congress shall have power to enforce' mean that equal protection shall be provided for all persons.
2. *That a failure to enact the proper laws for that purpose, or a failure to enforce them,* is a denial of equal protection. (Emphasis added.)
3. That when there is such a denial Congress may enact laws to secure equal protection.[44]

Representative Lawrence in debates on the Civil Rights Act of 1875 stated:

> What the State permits by its sanction, having the power to prohibit, it does in effect itself.[45]

Senator Pool in debates on the Enforcement Act of May 31, 1870, 16 Stat. 140, argued that:

> . . . . but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. *It shall not deny by acts of omission,* by a failure to prevent its own citizens

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[44] Cong. Globe, 42nd Congress, 1st Sess., p. 483 (1871).

[45] Cong. Rec., 43d Cong., 1st Sess. 412 (1874).

from depriving by force any of their fellow-citizens of these rights.[46] (Emphasis added.)

This view is endorsed by the opinion in the *Civil Rights Cases*, for that decision was based on the assumption that the states in question would provide remedies securing to their citizens the right of access to places of public accommodation without racial discrimination:

> We have discussed the question presented by the law on the assumption *that a right to enjoy equal accommodations* and privileges in all inns, public conveyances, and places of public amusement, *is one of the essential rights of the citizen which no state can abridge or interfere with* (109 U. S. at 19). (Emphasis added.)
>
> * * * * *
>
> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and *presumably subject to redress by those laws until the contrary appears?* (109 U. S. at 24). (Emphasis added.)

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[46] Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).

Other contemporary congressmen also suggested that state inaction may be as culpable as action: In a speech delivered by Representative Bingham of Ohio, the framer of the key phrases in Section One, it was repeatedly stated that the Fourteenth Amendment granted Congress the power to act on individuals and could provide relief against the denial of rights by the states whether by "acts of omission or commission." Appendix to the Cong. Globe, 42d Congress, 1st Sess. 85. Representative Coburn of Indiana said that a state could deny equal protection by failing to punish individuals violating the rights of others. Cong. Globe, 42d Congress, 1st Sess. 459.

Mr. Justice Bradley's entire opinion was concerned with the question whether the Fourteenth Amendment had conferred on Congress the power to regulate the acts of private individuals when, as he presumed, the States were exercising their responsibilities toward the goal of eliminating racial discrimination. While he concluded in the negative, it is extremely doubtful that the result would have been the same if a state had been found to be in effect sanctioning private discrimination by laxity in this regard. See Konvitz & Leskes, *A Century of Civil Rights* 150 (1961); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L. Q. 375, 376; Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149, 184 (1935); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 21 (1959).

This case, therefore, is like *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 725:

> [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

For here in an area in which the State is deeply involved it has both positively and negatively sanctioned the racial segregation which gave rise to this case.

## II.

## The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

### A. The Enforcement of the State and City Segregation Policy and the Interference of the Police Violated Petitioners' Right to Freedom of Expression.

Petitioners were engaged in the exercise of free expression, by verbal and nonverbal requests to the management for service, and nonverbal request for nondiscriminatory lunch counter service, implicit in their continued presence in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 368 U. S. at 201. The manner of petitioners' expression was entirely appropriate to the time and place at which it occurred. Petitioners did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other possibly inappropriate forms of expression in the store. Rather they offered to purchase in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas," *Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, J., dissenting, within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*,

319 U. S. 624, 633-634 (flag salute); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 44 (freedom of association).

Questions concerning free speech expression are not resolved merely by reference to the fact that private property is involved. The Fourteenth Amendment right to free expression on private property takes contour from the circumstances, in part determined by the owner's privacy, his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U. S. 622, 644, the Court balanced the "householders' desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publishers' right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest, must be taken into account.

In this constitutional context it is crucial, therefore, that the stores implicitly consented to the continuance of the protest and did not seek intervention of the criminal law. For, this case is like *Garner* v. *Louisiana*, *supra*, where Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. In none of the cases at bar did anyone other than the police request petitioners to leave the store. In one pair of cases there was not even a request to leave the dining area. The pattern of police action, obviously, was to arrest Negroes in white dining areas. In no case does it appear that anyone connected with the store called the police or subsequently signed an affidavit or complaint. In each case the police

officer proceeded immediately to arrest the petitioners without any request to do so on the part of anyone connected with the store.

In such circumstances, petitioners' arrest must be seen as state interference in a dispute over segregation at these counters and tables, a dispute being resolved by persuasion and pressure in a context of economic and social struggle between contending private interests. The Court has ruled that judicial sanctions may not be interposed to discriminate against a party to such a conflict. *Thornhill* v. *Alabama, supra; San Diego Bldg. Trades Council* v. *Garmon*, 349 U. S. 236.

But even to the extent that the stores may have acquiesced in the police action a determination of free expression rights still requires considering the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action supports. *Marsh* v. *Alabama*, 326 U. S. 501.

In *Marsh*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama; supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357. Compare the cases mentioned above with *N.L.R.B.* v. *Fansteel*

*Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948) the court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those whose use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by these trespass prosecutions is support of the property owner's discrimination in conformity to the State's segregation custom and policy and the express terms of the City Ordinance. This is all that the property owner can be found to have sought.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States*, 249 U. S. . . . 52. The only "substantive evil" sought to be prevented by these trespass prosecutions is the stifling of protest against the elimination of racial discrimination, but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. See *Cooper* v. *Aaron*, 358 U. S. 1; *Terminiello* v. *Chicago*, 337 U. S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Cir. 1947), cert. denied 332 U. S. 851.

**B. The Convictions Deny Petitioners' Right to Freedom of Expression in That They Rest on a Statute Which Fails to Require Proof That Petitioners Were Requested to Leave by a Person Who Had Established Authority to Issue Such a Request at the Time Given.**

In the courts below petitioners asserted that the ordinance in question as applied to them denied due process of law secured by the Fourteenth Amendment to the Constitution of the United States in that it did not require that the persons requesting them to leave the dining areas established or, indeed, asserted their authority to make the demands. In none of the ten records before this court did the persons who demanded that petitioners leave first inform petitioners or demonstrate to them that they had authority to request that the petitioners leave the areas in question. Only in one pair of cases (Parker 162, West 192) did the witness say that he "identified" himself. Yet there was no evidence that he claimed authority to order petitioners out of the dining area, or indeed, that the witness possessed such authority. No one ordinarily may be expected to assume that one who tells him to leave a public place, into which the proprietor invited him and in which he has traded, is authorized to utter such an order when no claim of such authority is made.

This is especially true in the case of a Negro seating himself in a white dining area in Birmingham, Alabama—obviously a matter of controversy and on which any stranger, or the police of a city with a segregation Ordinance, might be expected to volunteer strong views. If the statute in question is interpreted to mean that one must leave a public place under penalty of being held a criminal when ordered to do so by a person who later turns out to have been in authority without a claim of authority at the time, it means as a practical matter that one must depart

from a public place whenever told to do so by anyone; the alternative is to risk fine or imprisonment. Such a rule might be held a denial of due process. Cf. *Lambert* v. *California*, 355 U. S. 225. But if such is the rule the statute gives no fair warning. *Winters* v. *New York*, 333 U. S. 507; *Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Absent such notice petitioners surely were entitled to assume that one may go about a public place under necessity to observe orders only from those who claim with some definiteness the right to give them.

Indeed, as a matter of due process of law, if it is the rule that one must obey all orders of strangers to leave public places under penalty of criminal conviction if one uttering the order later turns out to have had authority, petitioners are entitled to more warning of its harshness than the Ordinance's text affirmed. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Otherwise many persons—like these petitioners—may be held guilty of crime without having intended to do wrong. This Court has said however, that

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morrissette* v. *U. S.*, 342 U. S. 246, 250.

*Morrissette*, of course, involved a federal statute as treated in the federal courts. But it expresses the fundamental view that *scienter* ought generally to be an element in criminality. See Sayre, *Public Welfare Offenses*, 33 Columbia L. Rev.

55, 55-6 (1933). The pervasive character of *scienter* as an element of crime makes it clear that a general statute like the ordinance now in question, in failing to lay down a *scienter* requirement, gives no adequate warning of an absolute liability. Trespass statutes like the one at bar are quite different from "public welfare statutes" in which an absolute liability rule is not unusual. See *Morrissette* v. *United States*, *supra*, 342 U. S. at 252-260.

Indeed, the ordinance in question is significantly different from Code of Alabama, Title 14, §426, which at least exculpates those who enter with "legal cause or good excuse" a phrase missing from the Birmingham ordinance. Cf. *Central Iron Co.* v. *Wright*, 20 Ala. App. 82, 101 So. 815; *McCord* v. *State*, 79 Ala. 269; American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comments.

On the other hand however, if Alabama were to read a *scienter* provision into this ordinance for the first time—which it has failed to do although the issue was squarely presented in these ten cases—the lack of the necessary element of guilt, notice of authority, patent on the face of all ten records, would require reversal under authority of *Garner* v. *Louisiana*, *supra*; *Thompson* v. *City of Louisville*, 362 U. S. 199.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.**

Respectfully submitted,

CONSTANCE BAKER MOTLEY
JACK GREENBERG
10 Columbus Circle
New York 19, N. Y.

ARTHUR D. SHORES
PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Birmingham, Alabama

*Attorneys for Petitioners*

LEROY CLARK
WILLIAM T. COLEMAN, JR.
MICHAEL MELTSNER
WILLIAM R. MING, JR.
JAMES M. NABRIT, III
LOUIS H. POLLAK
*Of Counsel*